Tentative Rulings for March 28, 2012
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

10CECG02135 ***Fletcher v. HPN Holdongs, Inc.*** **(Dept. 402)**

11CECG00494 ***HLS 10-1075 Series 1, LLC v. Gonzalez, et al.*** **(Dept. 403)**

12CECG00763 ***Sol-Tek Industries, Inc. v. Turner*** **(Dept. 403)**

11CECG03413 ***Hysell v. State of Calif*** **(Dept. 403)**

10CECG03284 ***Woodmansee v. DCL Investments*** **(Dept. 403) only on the motions:**

By defendants to quash deposition notice to Bank of America's Custodian of Records, or in the alternative, for a protective order;

By defendants to quash deposition notice to California Bank and Trust, or in the alternative, for a protective order;

By defendants to compel plaintiffs to provide further responses to Special Interrogatories, Set No. One;

By defendants to compel plaintiffs to provide responses to Form Interrogatories, Set No. One;

By defendants to compel plaintiffs to provide further responses and produce responsive documents to Demand for Inspection, Set No. One.

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

11CECG02836 ***Lunn v. J.P. Morgan Chase Bank, N.A. et al*****. is continued to Wednesday, April 18, 2012, at 3:30 p.m. in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Ruling

Re: ***Martinez v. The Alternate Defense Office et al.***
Superior Court Case No. 08 CECG 04381

Hearing Date: March 28, 2012 (Dept. 503)

Motion: Plaintiff's Motion

Tentative Ruling:

This motion is off calendar due to the failure to file any supporting papers. The Court further notes that the motion would be denied as moot. The entire action was dismissed without prejudice by Department 98B on February 25, 2010.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: A.M. Simpson (Judge's initials) on 3-22-12 (Date).

Tentative Ruling

Re: ***Martinez v. Paradise Motel et al.***
Superior Court Case No. 09CECG00221

Hearing Date: March 28, 2012 (Dept. 503)

Motion: Plaintiff's Motion

Tentative Ruling:

This motion is off calendar due to the failure to file any supporting papers. The Court further notes that the motion would be denied as moot. The entire action was dismissed without prejudice by Department 98B on March 11, 2010.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **3-22-12** (Date) **.**

Tentative Ruling

Re: ***Martinez v. Department of Child Support Services et al.***
Superior Court Case No. 09CECG00391

Hearing Date: March 28, 2012 (Dept. 503)

Motion: Plaintiff's Motion

Tentative Ruling:

This motion is off calendar due to the failure to file any supporting papers. The Court further notes that the motion would be denied as moot. The entire action was dismissed without prejudice by Department 98B on February 25, 2010.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: A.M. Simpson on 3-22-12.

(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Sandhu v. Thind***
Case No. 10 CE CG 02779

Hearing Date: March 28th, 2012 (Dept. 502)

Motion: Defendant Thind's Motion to Compel Plaintiff Sandhu to Respond to Discovery

Tentative Ruling:

To grant the motion to compel plaintiff Sanhu to respond to defendant Thind's form interrogatories, set two, special interrogatories, set two, and requests for production of documents, set two. (CCP §§ 2030.290; 2031.300.) All objections are deemed waived. (*Ibid*.) Plaintiff shall serve verified responses without objections within 10 days of the date of service of this order.

To grant monetary sanctions against plaintiff, in the amount of $175. (*Ibid*.) While defendant has sought $1,375.00 in sanctions based on 5.5 hours billed at $250 per hour, defense counsel has spent an excessive amount of time preparing the motion, including preparing a separate statement of items in dispute and writing an 11 page points and authorities brief. A separate statement is only required for a motion to compel further responses to discovery, not a motion to compel initial responses. (CRC 3.1345(a)(1), (2), (3).) Meet and confer efforts are also not required for a motion to compel initial responses. (CCP §§ 2030.290; 2031.300.) Discussion of the content of the discovery requests in the points and authorities brief is also unnecessary in a motion to compel initial responses. Therefore, the court intends to award only one hour of sanctions, billed at the reduced rate of $175 per hour.

Plaintiff shall pay monetary sanctions to defendant within 30 days of the date of service of this order.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: DSB (Judge's Initials) **on 3-22-12** (Date).

(20) **Tentative Ruling**

Re: ***Burcham v. SBC Internet Services, Inc., et al***, Superior Court Case No. 10CECG03704

Rashid v. Pacific Bell Telephone Co., Superior Court Case No. 11CECG03225

Hearing Date: **March 28, 2012 (Dept. 403)**

Motion: Motion to Consolidate Actions

Tentative Ruling:

To grant the motion to consolidate case numbers 10CECG03704 and 11CECG03225. Code Civ. Proc. § 1048(a). Case no. 10CECG03704 shall be the lead case.

The court finds that the factual issues, claims, parties and witnesses in the two actions are sufficiently similar so that consolidation will promote trial convenience by avoiding duplication of procedure. No opposition to the motion has been filed by any party.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **3/27/12** (Date).

(19) **Tentative Ruling**

Re: ***Granite State Ins. Co. v. Bautista***
Superior Court Case No. 10CECG01080

Hearing Date: March 28, 2012 (Dept. 502)

Motions: by plaintiff to deemed requests for admission admitted against David Bautista

By plaintiff to compel defendant David Bautista to answer form interrogatories

Tentative Ruling:

To continue to April 17, 2012, with instructions for action during the interim.

Explanation:

The motion seek orders directed at defendant David Bautista, including monetary sanctions from that defendant for his failure to answer discovery. However, the contents of the motions include a letter from defense counsel stating that David Bautista is imprisoned and unaware of the discovery, as counsel had not contacted him. It is not proper at this point to impose orders and sanctions where the facts are uncertain as to who has failed in his responsibility.

Defense counsel is ordered to file a declaration on or before April 6, 2012, stating the last time he spoke to David Bautista, any knowledge he has about where David Bautista is imprisoned, and as to counsel's efforts to locate client David Bautista. Jesus Bautista is ordered to do the same, as well as to advise the Court as to his knowledge of when the imprisonment began. Such declarations shall also be served on plaintiff's counsel the same date.

The parties are to return on April 17, 2012, at 3:30 p.m. to this Department.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling DSB 3-22-12

Issued By: _____ on _____.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Citizens for the Restoration of L Street v. City of Fresno***
Case No. 11 CE CG 04172

Hearing Date: March 28th, 2012 (Dept. 402)

Motion: Respondent City of Fresno's Motion to Dismiss

Tentative Ruling:

To deny the respondent's motion to dismiss, in its entirety.

Explanation:

First of all, the motion to dismiss improperly seeks to dismiss only portions of petitioner's claims, rather than seeking to dismiss entire causes of action.

"An action may be dismissed upon motion where the complaint does not state a cause of action and cannot be amended to state such. [Citations.] The motion is in the nature of a general demurrer. [Citation.] An order granting the motion is tantamount to an order sustaining a demurrer without leave to amend. [Citation.] Where it is possible to amend the complaint to state a cause of action and the plaintiff is not afforded an opportunity to amend, a dismissal, whether upon motion or demurrer, is error. [Citations.]" (*Timberlake v. Schwank* (1967) 248 Cal.App.2d 708, 709.)

A general demurrer will not lie as to part of a cause of action, and it will only lie where the entire cause of action fails to state facts sufficient to constitute a claim. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2003) 108 Cal.App.4th 1028, 1047.) "[A] demurrer cannot rightfully be sustained to part of a cause of action or to a particular type of damage or remedy." (*Ibid*.) Also, if the complaint states *any* valid cause of action, even one not intended by the plaintiff, the complaint is good against a general demurrer. (*Quelimaine Co., Inc. v. Stewart Title Guarantee Co*. (1998) 19 Cal.4th 26, 38-39.)

Here, respondent City of Fresno moves to dismiss paragraphs 18(c), 18(d), and part of the prayer for relief seeking an injunction against the demolition of the Crichton and Sayre homes. However, respondent is not seeking to dismiss the entire petition, or any complete cause of action in the petition. It appears that the City's motion is more akin to a motion to strike rather than a general demurrer or motion to dismiss, since the City is attempting to strike only two paragraphs of the petition and one part of the prayer for relief. Therefore, the motion to dismiss is not properly brought and the court cannot grant it.

Even if the court overlooks the obvious procedural problems with the motion to dismiss, it would still deny the motion. Respondent argues that the request for an injunction against the demolition of the Crichton and Sayre homes is moot, because the homes have already been demolished. However, in *Woodward Park Homeowners Association v. Garreks, Inc*. (2000) 77 Cal.App.4th 880, the Fifth District Court of Appeal held that, even though the project that the petitioners sought to challenge had already been completed by the time the trial court ruled on the merits of the petition, the issues of the case were not moot.

"A case is moot when any ruling by this court can have no practical impact or provide the parties effectual relief. [Citation.] Courts have applied this rule to CEQA challenges, but not on the basis the City asserts here. [Citations.] [¶] This case does not present a situation where a ruling by this court can have no practical impact or not provide the parties relief. To the contrary, our ruling can afford WPHA effective relief. As recognized by WPHA, a decision upholding the court's order directing the preparation of an EIR could result in modification of the project to mitigate adverse impacts or even removal of the project altogether." (*Id*. at 888.)

The *Woodward Park* court also distinguished *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, which is also cited by respondent in the present case. (*Id*. at 888-889.)

"In *Hixon*, the petitioners sought mandamus to compel a county to obtain an EIR in connection with street and sidewalk improvements that necessitated the removal and replacement of trees. The court held that because the trees had already been cut down, the trial court correctly determined that preparation of an EIR for that phase of the project would be futile. [Citation.] The distinction between *Hixon* and this case is obvious. In *Hixon*, the trees were already cut down; thus the original trees could not be returned. They could only be replaced, which is what the county had already done. [Citation.] Here, in contrast, the project can be modified, torn down, or eliminated to restore the property to its original condition." (*Ibid*.)

In addition, the court noted that the developer proceeded with the project after the petition for writ of mandate had been filed, and thus it could not complain that completion of the project made the environmental review process unnecessary. (Id. at 889.) "What the City fails to recognize is that Garreks proceeded with construction and completion of the project *after* WPHA filed its mandamus petition. How can the City or Garreks now legitimately complain that compliance with the court's order is unnecessary?" (*Ibid,* emphasis in original.)

"It would hardly be sound public policy to allow a party to avoid CEQA by continuing with construction of a project in the face of litigation, delaying preparation of a court-ordered EIR pending appeal, and then arguing the case is moot because the project has been completed and is operating." (*Ibid*.)

"Garreks chose to continue with the project despite the risk that pending litigation could result in rescission of the City's action approving it… Garreks's decision to complete and operate the project, despite the pending litigation, in no way provides an exemption to CEQA." (*Id*. at 890.)

Likewise, here respondent City issued the demolition permit at 4:30 p.m. on Friday, December 9th, 2011, four days after the petition was filed. The homes were demolished the next morning, which was a Saturday. Defense counsel had allegedly given assurances to petitioner's counsel that an ex parte TRO and injunction was not necessary to prevent demolition of the homes, and it was not until the demolition was already complete that petitioner's counsel realized that respondents had gone ahead with the demolition despite the assurances of their counsel. (Brandt-Hawley decl., ¶¶ 9-15.)

To paraphrase the *Woodward Park* court, it would hardly be sound public policy to allow a party to avoid CEQA by continuing with demolition of potentially historically significant resources and construction of the project in the face of litigation, and then allow them to argue that the case is moot because the demolition has been completed. This would essentially reward the respondents for their dubious behavior in continuing with the project and demolition, despite their knowledge of the pending litigation. If the court allows the demolition of the houses to render the case moot, then it would be encouraging parties in other CEQA writ cases to act in the same way and continue with challenged projects despite knowledge of the fact that there is litigation pending. Petitioners' attorneys would have to file ex parte TRO's and preliminary injunctions every time they initiated a new CEQA writ case, or they would risk having the site they seek to protect bulldozed before the case can be heard, and then have the case dismissed for mootness. Surely this is not the intent of the CEQA statutes.

In any event, while it is clearly too late to turn back the clock and prevent the demolition of the Crichton and Sayre homes, there are still other issues that the court can rule upon effectively, such as whether the City properly gave permission to begin the project despite the lack of full environmental review, and whether project should be stopped while the City conducts a full environmental review. The petition seeks not only to stop the demolition of the houses, but also an order requiring the City to rescind its approval of the project and refrain from further consideration of approval until it fully complies with CEQA by preparing an adequate EIR and adopting feasible alternatives and mitigation measures. (Petition, p. 7, ¶ 1.) The petition also seeks an injunction against not only the demolition of the houses, but also all construction activities while the petition is pending. (*Id*. at ¶ 2.) These issues were not rendered moot by the demolition of the houses, since the court can still make effective orders regarding whether the project should continue, or whether it should be halted while the City conducts a full environmental review. The City and Granville should not be allowed to avoid application of CEQA by moving forward with the demolition of the homes and

construction of the projects in the face of the pending litigation. (*Woodward Park, supra*, at 888-890.)

The court can also decline to find a case moot where the case raises important public interest questions that are capable of being repeated in other cases. (*San Diego Trust & Savings Bank v. Friends of Gill* (1981) 121 Cal.App.3d 203, 209.) For example, in *San Diego Trust & Savings Bank, supra*, the Court of Appeal refused to find the matter moot even though the City had already issued the demolition permit and the building in question had already been removed, because of the continuing public importance of preserving historical sites and the City's method of dealing with demolition permits. (*Ibid*.)

"In a proceeding that might otherwise be deemed moot, we have discretion to resolve an issue of continuing public interest that is likely to reoccur in other cases, and such resolution is particularly appropriate when it is likely to affect the future rights of the parties before us [citation]. The continuing public importance of preserving historical sites and the City's method of dealing with demolition permits require we address the issues at this time, even though our opinion will have no effect on the preservation of this historical site. The motion to dismiss is denied." (*Ibid*.)

In the present case, there are also issues of public importance regarding the preservation of historical sites and the City's method of dealing with demolition permits. These issues are likely to reoccur in other cases, as developers continue to seek to demolish older structures to make way for new development.

Likewise, in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, the Court of Appeal refused to find that the partial completion of the project rendered further review moot.

"First, developers expressly recognized that they were proceeding at their own risk when they relied on the contested project approvals during the pendency of this litigation. When an injunction is not granted after commencement of a CEQA action, the agency is to assume that the contested EIR or negative declaration satisfies CEQA's requirements. However, '[a]n approval granted by a responsible agency in this situation provides only permission to proceed with the project at the applicant's risk prior to a final decision in the lawsuit.' (Guidelines, § 15233, subd. (b).) Although BCLC's failure to diligently and expeditiously seek injunctive relief necessitated our denial of its belated pleas for issuance of extraordinary relief pending issuance of this opinion, it did not provide developers with a 'pass' on full CEQA compliance or grant them any vested interest in improvements that were completed at their own risk… As a matter of public policy and basic equity, developers should not be permitted to effectively defeat a CEQA suit merely by building out a portion of a disputed project during litigation or transferring interests in the underlying real

property. Failure to obtain an injunction should not operate as a de facto waiver of the right to pursue a CEQA action." (*Id*. at 1203.)

The *Bakersfield* court also found that there were still significant questions concerning urban decay and cumulative impacts that were important issues of public interest, and were likely to reoccur. (*Ibid*.)

"Finally, even at this late juncture full CEQA compliance would not be a meaningless exercise of form over substance. The City possesses discretion to reject either or both of the shopping centers after further environmental study and weighing of the projects' benefits versus their environmental, economic and social costs. As conditions of reapproval, the City may compel additional mitigation measures or require the projects to be modified, reconfigured or reduced. The City can require completed portions of the projects to be modified or removed and it can compel restoration of the project sites to their original condition." (*Id*. at 1204.)

Similarly, here the issues of the case are not moot, since even after demolition of the houses, there is still the question of whether the City should have approved the project without full environmental review, and whether the project may have other environmental impacts. There are also significant questions regarding urban decay and cumulative impacts that are likely to reoccur. The City may find that the project must be rejected after further environmental review and study. The City may also require further mitigation measures, or it may require modification of portions of the project. Therefore, the court intends to to find that the demolition of the houses in the present case has not rendered the petition moot.

The City also argues that the court should dismiss the allegations of paragraph 18(c), that the Historical Preservation Commission had no authority to approve the mitigated negative declaration, claiming that this allegation fails to state a claim as a matter of law. Again, however, this allegation is not properly the subject of a motion to dismiss, since it is not a "cause of action" in itself, but merely supports the petitioner's position that the City's approval of the project and demolition was not in compliance with CEQA. Thus, the City cannot move to dismiss the allegation for failure to state a cause of action, since it is not attempting to state a separate cause of action.

In any event, even if the court were to treat the motion to dismiss as a motion to strike the allegation, the court would still deny the motion. The City contends that the allegation is contrary to law, because the HPC was authorized to approve the mitigated negative declaration and demolition of the houses under the Fresno Municipal Code § 12-1619(a). The City also claims that the HPC was the "lead agency" under CEQA, and therefore had full authority to approve the mitigated negative declaration and demolition. (*Cedar Fair L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1162, fn. 3.)

However, there is at least some question as to whether the HPC was authorized to approve the mitigated negative declaration under CEQA. Petitioner contends that the HPC was not a "public agency" with authority to approve the mitigated negative declaration under CEQA. " 'Public agency' includes any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." (Cal. Public Resources Code § 21063.) Thus, while a city is a "public agency" under CEQA, it does not appear that the Historic Preservation Commission, which is a subdivision of the City, would be a public agency. At the very least, this is an issue that needs to be resolved after a hearing on the merits.

Under 14 Cal Code of Regulations 15025(b), "a public agency shall not delegate the following functions: (1) Reviewing and considering a final EIR or approving a negative declaration prior to approving a project." This language appears to bar the City from delegating the approval of the mitigated negative declaration to the HPC. There is at least a fair argument to be made that the HPC did not have the authority to approve the mitigated negative declaration. Therefore, the court does not intend to strike or dismiss the allegation that the HPC lacked authority under CEQA to approve the mitigated negative declaration, and that the City improperly upheld the Commission's decision.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 3/26/2012 .
(Judge's Initials) (Date)

Tentative Ruling

(24)

Re: ***South Fresno Housing, LLC, v. Myron Smith, et al.***
Court Case No. 10CECG00813

Hearing Date: **March 28, 2012 (Dept. 403)**

Motion: Plaintiff's Motion to Compel Responses to Request for Production of Documents Propounded to Defendant Myron Smith, and for Monetary Sanctions

Tentative Ruling:

To grant plaintiff's motion to compel production of documents. Defendant Myron Smith shall serve responses to same, without objection, within 10 days after service of this minute order by the clerk [CCP §§ 2031.010 and 2031.300]

To grant plaintiff's request for monetary sanctions against Defendant Myron Smith in the amount of $1,413.50, payable by defendant within 20 court days from the date of service of the minute order by the clerk. [CCP §2031.300(c)]

Explanation:

Failing to respond to discovery within the 30-day time limit waives objections to the discovery, including claims of privilege and "work product" protection. [CCP § 2031.010; CCP § 2031.300(a)]

Sanctions are mandatory against the party who loses the motion to compel responses to discovery unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." Code Civ. Proc. § 2031.300(c)] Pursuant to CRC 3.1030(a), this also applies where no opposition to the motion was filed. The sanction amount awarded has been reduced $78.00 from the amount requested, since a Court Call appearance by moving party will not be necessary unless plaintiff opposes the motion.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **3/27/12** (Date) .

Tentative Ruling

(17)

Re: ***Clark v. Sierra Pathology Laboratory, Inc. et al.***
Superior Court Case No. 10 CECG 04233

Hearing Date: March 28, 2012 (Dept. 403)

Motion: Honda and Karian Defendants' Demurrers to First Amended Complaint

Tentative Ruling:

To sustain the general demurrers without leave to amend.

Explanation:

"'The defense of statute of limitations may be asserted by general demurrer if the complaint shows on its face that the statute bars the action.' [Citations.]" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.) The parties dispute which statute provides for the applicable statute of limitations: Code of Civil Procedure 340.5, applicable to medical negligence actions, or Code of Civil Procedure section 335.1, applicable to general personal injury actions.

he California Supreme Court has set forth guidelines for determining which statute of limitations applies when there is an apparent conflict. "In seeking to determine which statute of limitations was intended to govern on facts such as those before us, our goal is to discern the probable intent of the Legislature so as to effectuate the purpose of the laws in question. [Citations.] We examine the statutes in their context and with other legislation on the same subject [citation]. If they conflict on a central element, we strive to harmonize them so as to give effect to each. If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citations] and more specific provisions take precedence over more general ones. [Citation.] Absent a compelling reason to do otherwise, we strive to construe each statute in accordance with its plain language." (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 309–310.)

Code of Civil Procedure section 335.1 provides as follows: "[w]ithin two years: An action for assault, battery, or *injury to*, or for the death of, an individual *caused by the wrongful act or neglect of another*." (Emphasis added.) The section was added in 2002 after the September 11, 2001 terrorist attacks. Prior to that time the statute of limitations for personal injury and wrongful death actions was one year. (See *Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, 1028.)

Section 340.5 provides, in relevant part: “[i]n an action for *injury* or death *against a health care provider based upon such person's alleged professional negligence*, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.” (Emphasis added.) For the purposes of section 340.5 "professional negligence" means a “*negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury* or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.” (Emphasis added.)

Section 340.5 is the more specific statute and the one applicable under the plain language of the First Amended Complaint. Plaintiffs allege that: 1) defendant Honda is a licensed pathologist (FAC ¶ 3); defendant Sierra Pathology Laboratory, Inc. is a group of pathologists (FAC ¶ 2); 3) defendant Karian is an oral surgeon (FAC ¶ 6); and 4) defendant Fresno Oral and Maxillofacial Surgery Group was a group of oral surgeons (FAC ¶ 5). Tommy Ray alleges that his “injury” consists of “the loss or diminution of Aurora’s love, companionship, affection, sexual relations, and solace” as well as the loss of Aurora’s services as a spouse in caring for Tommy Ray and the family home. (FAC ¶ 35.) These injuries “directly and proximately resulted from Defendants’ professional negligence toward Aurora …” (FAC ¶ 35.) The date the injuries began is January 14, 2010, the date of Aurora’s second surgery. (FAC ¶¶ 22, 35.)

Tommy Ray’s claims date only from the filing of the First Amended Complaint on December 15, 2011, and are thus time barred. An amended pleading that adds a new plaintiff will not relate back to the filing of the original complaint if the new party seeks to enforce an independent right or to impose greater liability against the defendants. (*Bartalo v. Superior Court* (1975) 51 Cal.App.3d 526, 533–534 [loss of consortium].)

Plaintiffs’ authority is inapposite, as none of it addresses the question before this court, i.e. what statute of limitations controls a spouse’s loss of consortium claim where the injured spouse’s statute of limitations is controlled by Code of Civil Procedure section 340.5?

In *Priola v. Paulino* (1977) 72 Cal.App.3d 380, an automobile accident case, the husband of an injured wife filed a complaint for loss of consortium to which the trial court sustained a demurrer with leave to amend. In affirming, the appellate court noted that generally, spouses have one year from the date of the underlying injury to their spouse in which to file suit for loss of consortium, citing *Rodriguez v. Bethlehem Steel Corp*. (1974) 12 Cal.3d 382, 408 fn. 30 which states that the applicable statute of limitations for a loss of consortium is Code of

Civil Procedure section 340, subdivision 3, which is now section 355.1. (*Priola*, *supra*, 72 Cal.App.3d 380 at p. 383)

Meighan v. Shore (1995) 34 Cal.App.4th 1025 is not a medical malpractice case, but a legal malpractice case wherein the appellate court held that where the attorney was or should have been aware of the wife's claim for loss of consortium, the attorney had a duty to inform the wife of the cause of action. (*Id*. at p. 1029.) In reaching this conclusion, the Meighan court stated "[t]he statute of limitations for loss of consortium is one year from the date of the spouse's injury, and there is no tolling during the pendency of the spouse's personal injury action," citing *Priola* with no analysis. *Meighan* does not hold that the general statute of limitations afforded by former section 340, subdivision 3, or the current section 335.1 controls over section 340.5.

To the contrary, courts dealing with conflicts between section 340.5 and other statues of limitations have held that section 340.5 controls. In *Keleman v. Superior Court* (1982) 136 Cal.App.3d 861, the Court of Appeal was presented with the question of whether Civil Code section 29 or Code of Civil Procedure section 340.5 stated the statute of limitations for a minor's action against a health care provider for prenatal injury and concluded that Code of Civil Procedure section 340.5 controlled.

> There are two statutory periods of limitations textually applicable to actions for prenatal medical malpractice. Section 340.5 is the later and more specific prescription and is an integral part of an interrelated, comprehensive legislative scheme to deal with such cases. For those reasons, notwithstanding that section 340.5 omits expressly to refer to Civil Code section 29, we believe that section 340.5 supplants the period of limitations of Civil Code section 29 in medical malpractice actions and is therefore the controlling provisions here. [Citation.]
>
> MICRA affects only medical malpractice causes of action. All such actions come within the purview of the statute, including those which exist only by virtue of the substantive provisions of Civil Code section 29 creating a cause of action for prenatal injury suffered by a minor born alive. Actions under Civil Code section 29 for intentional torts or negligent injury other than by a health care provider are not affected. [Citation.]

(*Kelemen v. Superior Court*, *supra*, 136 Cal.App.3d 861, 866–867; see also *Knox v. Superior Court* (1983) 140 Cal.App.3d 782, 784.)

Applying section 340.5 to Tommy Ray's loss of consortium claim is consistent not only with the clear language of the statute and First Amended Complaint but the statutory scheme to which section 340.5 belongs. Subdivision (1) of section 340.5 came into existence as part of a multi-faceted legislative act directed at medical malpractice, MICRA. (*Chosak v. Alameda County Med. Ctr*.

(2007) 153 Cal.App.4th 549, 561.) MICRA was a response to concerns that the cost of medical malpractice insurance was threatening the availability of reasonably priced health care in California, and its various provisions were intended to reduce the premiums for such insurance by placing limits on the availability and extent of recovery in medical malpractice litigation. (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 577.) "The continuing availability of adequate medical care depends directly on the availability of adequate insurance coverage, which in turn operates as a function of costs associated with medical malpractice litigation. [Citation.] Accordingly, MICRA includes a variety of provisions all of which are calculated to reduce the cost of insurance by limiting the amount and timing of recovery in cases of professional negligence. (See Bus. & Prof. Code, § 6146 [limiting contingency fees in medical malpractice actions]; Civ. Code, § 3333.1 [admitting evidence of collateral source payments and precluding subrogation on behalf of collateral sources]; Code Civ. Proc., § 667.7 [authorizing periodic payments for future damages in excess of $50,000, with termination of benefits in the event of death].)" (*Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 111–112.)

The importance of MICRA has lead courts to impose MICRA's provisions on non-patients in a variety of circumstances. (See *Williams v. Superior Court* (1994) 30 Cal. App. 4th 318 [Code Civil Proc. § 425.13 punitive damage limitation applied "to any foreseeable injured party, including patients, business invitees, staff members or visitors, provided the injuries alleged arose out of professional negligence."]; *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380 [Civil Code section 3333.2 applied separately to a claim for loss of consortium brought by the spouse of an injured patient]; *Yates v. Pollock* (1987) 194 Cal.App.3d 195 [the limitation on noneconomic damages contained in Civil Code section 3333.2 applies in a wrongful death action initiated by deceased patient's survivors]; and *Hedlund v. Superior Court* (1983) 34 Cal.3d 695 [Section 340.5 applied where a woman sued two psychologists claiming injuries sustained as a result of psychologists' failure to disclose a patient's intentions of harming the plaintiff].)

Because there is no foreseeable ability to plead around the defect on the face of the complaint the demurrer is sustained without leave to amend.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: **MWS** (Judge's initials) **on** **3/27/12** (Date).

(19) **Tentative Ruling**

Re: ***Pearson v. Cervantes***
Superior Court Case No. 11CECG03580

Hearing Date: March 28, 2012 (Dept. 501)

Motion: Demurrer by defendants Cervantes, Butler, Cappel, Johnson-Chu, and Swarthout to Complaint

Tentative Ruling:

To sustain. Plaintiff may file an amended complaint within 45 days of oral argument.

Oral argument on this matter is continued to April 11 at 3:30 in Dept. 501 so that the Plaintiff may be present for oral argument via Court Call.

Explanation:

1. Judicial Notice

The request for judicial notice should be denied. The only thing subject to judicial notice is the certification letter, but not for the truth of its contents. See *Sosinsky v. Grant* (5th Dist., 1992) 6 Cal. App. 4th 1548, 1569. Evidence Code section 1280 governs admissibility of the records attached. It states:

> "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

There is no showing here on any of these. The contention that the documents themselves are all documents for two claims is not admissible either, because the government employee signing the certification did not state that she had made a "diligent search," as required by Evidence Code section 1284 before certification of absence of records is admissible without regard to the hearsay rule. And see *Sosinsky v. Grant* (5th Dist. 1992) 6 Cal. App. 4th 1548, 1564 (emp. in original):

> "What is meant by taking judicial notice of court records? There exists a mistaken notion that this means taking judicial notice of the existence of facts asserted in *every document* of a court file, including *pleadings* and *affidavits*. However, a court *cannot* take judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file. A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the *truth* of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."

"A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the *truth* of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." *Magnolia Square Homeowners Ass'n v. Safeco Ins. Co.* (1990) 221 Cal. App. 3d 1049, 1056 (emp. in original).

Defendants' contention that a contract may be judicially noticed is incorrect, unless there is no controversy over the contract. On demurrer, judicial notice of a private contract is reversible error. *Gould v. Maryland Sound Industries, Inc*. (1995) 31 Cal. App. 4th 1137, 1146 *(rev. denied*).[1] Accord *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal. App. 4th 97 – court could not convert demurrer hearing into quasi-evidentiary hearing by "judicially noticing" a contract.

2. Government Claim Issue

The filing of a claim form, where required, is an element of a valid cause of action. (*State of California v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1245; [element; inmate's complaint for intentional torts; malpractice]; *Connelly v. County of Fresno* (2006) 146 Cal. App. 4th 29, 37; *Del Real v. City of Riverside* (2002) 95 Cal. App. 4th 761, 767 [element]; *Wood v. Riverside General Hospital* (1994) 25 Cal. App. 4th 1113, 1119 [failure to file tort claim is not an affirmative defense issue, the filing of a claim is a necessary element of a plaintiff's cause of action]; *Illerbrun v. Conrad* (1963) 216 Cal. App. 2d 521, 523-524 [claim is element of cause of action].)

However, a plaintiff may also allege excuse from compliance with the claim statute, so as to satisfy this pleading requirement. (*Bodde, supra*, 32 Cal. 4th 1234, 1245.)

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[1] This case has been by the California Supreme Court as correctly stating the law on this issue of judicial notice in *People v. R*amos (1997) 15 Cal. 4th 1133, 1167, and again in *People v. Jones* (1997) 15 Cal. 4th 119, 172..

Plaintiff did not make such allegations here. The documents offered as part of the judicial notice request, and the opposition comments, show that it might be possible for him to amend his complaint to so state. The demurrer is sustained on this ground, with leave to amend.

3. Exhaustion of Administrative Remedies.

Failure to allege exhaustion of administrative remedies is a jurisdictional defect barring consideration of a complaint. *In re Bratton* (2012) 202 Cal. App. 4th 1300, 1303 (citations and internal quotations omitted): "[I]t is well settled that habeas corpus petitioners must exhaust available administrative remedies before seeking judicial relief, even where constitutional issues are at the core of the dispute. Exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts."

"Exhaustion is accomplished after an adverse decision at the '[t]hird formal level.' (Cal. Code Regs., tit. 15, section 3084.5, subd. (d)." *Sabatasso v. Superior Court* (2008) 167 Cal. App. 4th 791, 795. Accord *Wright v. State of California* (2004) 122 Cal. App. 4th 659, 664-667.

> "[W]e are met by the Attorney General's contention that, having failed to exhaust the administrative remedy offered to him in late 1965, plaintiff cannot now seek judicial protection. The argument does not require extended discussion. We have recently held that an opportunity for administrative review does not constitute the sort of remedy which a party must exhaust before invoking the assistance of the courts unless the statute or regulation under which such review is offered establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties."
>
> *Endler v. Schutzbank* (1968) 68 Cal. 2d 162, 168.

The system in place for prisoners was found to be such a system in *In re Muszalski* (1975) 52 Cal. App. 3d 500.

Plaintiff has not alleged he proceeded through all three levels, or that he was unable to do so, or that it would be futile. The demurrer is therefore be sustained on this ground as well.

3. Governmental Immunities

The defendants would like the Court to interpret the term "discretionary" in Government Code section 820.2 as widely as possible, to apply where any choice is present. The Courts have refused to do so. Instead, they have limited immunity to discretionary decisions involving basic policy pronouncements.

> "It requires us to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision."
>
> *Johnson v. State of California* (1968) 69 Cal. 2d 782, 794
>
> "Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity, the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."
>
> (*Id*. at fnt. 8.)

Policy considerations for placement of prisoners in Administrative Segregation have, to some extent, already been made. See California Code of Regulations, Title 15, section 3312 et seq. There are insufficient facts on demurrer to find that such immunity attaches as a matter of law.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: M.B. Smith **on 3/26/12**.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Wells Fargo Bank v. Millhollin et al.***
Superior Court Case No. 12 CECG 00367

Hearing Date: March 28, 2012 **(Dept. 402)**

Order to Show Cause Re: Appointment of Receiver

Tentative Ruling:

To grant. No opposition has been filed. The Oath of the Receiver has been signed and filed, the bonds have been posted and proof has been filed. The Order appointing the Receiver has been signed. The hearing will be taken off calendar.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 3/27/2012 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Wachovia Mortgage v. Andre P. Provost, et al.***
Superior Court No. 10 CECG 00514

Hearing Date: Wednesday, March 28, 2012 (**Dept. 403**)

Motion: Defendant Andre Provost, Jr.'s Demurrer to Plaintiff Wachovia Mortgage's First Amended Complaint

Tentative Ruling:

To OVERRULE Defendant's demurrer to Plaintiff's first, second, and third causes of action pursuant to Code of Civil Procedure § 430.10(e).

To ORDER Defendant to answer the Plaintiff's first amended complaint within 10 days, running from service of the minute order by the clerk. (California Rules of Court, rule 3.1320(g) and (j)(1).)

Explanation:

1. Defendant's Demurrer to Plaintiff's First Cause of Action for Cancellation of Instruments

Defendant Andre Provost, Jr. contends that the Plaintiff's first cause of action for cancellation of instrument fails to state facts sufficient to constitute a viable cause of action against Defendant. The elements of a cause of action for cancellation of instrument are: (1) a written instrument; (2) facts showing that the written instrument may cause serious injury to plaintiff; and (3) facts showing that the written instrument is void or voidable against the plaintiff. (Civil Code § 3412; *Zakaessian v. Zakaessian* (1945) 70 Cal. App. 2d 721, 724-25.)

Initially, Defendant argues that the Plaintiff has no standing to sue and, thus, cannot invoke the power of the Court. First, the Defendant states that the Plaintiff has no standing because first amended complaint is not verified. Regardless of the fact that a plaintiff's standing to sue is not determined by the verification, or lack of verification, of a pleading, the Court notes that the last page of the first amended complaint is a verification of the first amended complaint by Sharon Mason, a Vice President Loan Documentation of Plaintiff. Second, the Defendant states that the Plaintiff has no standing because Plaintiff's lawyers are not the real parties in interest and do not have personal first-hand knowledge of any of the facts in this case. Nevertheless, the fact that the Plaintiff's lawyers are not real parties in interest in this action and do not have personal knowledge of the facts does not mean that the Plaintiff has no standing to sue. Third, Defendant states that Plaintiff and Plaintiff's lawyers have failed to

provide any proof of personal injury to Plaintiff, a violation of anyone's constitutional rights, or a contract signed by both Plaintiff and Defendant evidencing a meeting of the minds. However, the Plaintiff does not need to prove that Plaintiff suffered a personal injury, that any party's constitutional rights were violated, or that there was a contract signed by both Plaintiff and Defendant in order to establish that Plaintiff has standing to sue. Therefore, the Court finds that the Defendant's argument that the Plaintiff does not have standing to sue fails.

Next, the Court finds that the Plaintiff has alleged sufficient facts to constitute a viable cause of action for cancellation of instruments against the Defendant. In the first cause of action, the Plaintiff alleges that a Deed of Trust was executed by Defendant Andre Provost on July 14, 2004 and that the Deed of Trust secured repayment of a $630,000.00 loan evidenced by a promissory note. The Deed of Trust was recorded in the Fresno County Recorder's Office as Document # 2004-0157223 on July 20, 2004. The Plaintiff further alleges that, on September 1, 2009, a written instrument entitled "Revised Full Reconveyance" was recorded as Document # 2009-0121195, and, on September 3, 2009, a written instrument entitled "Revised Grant Deed," which also purports to transfer Plaintiff's interest in the subject property to Defendant Stone Corner Trust, was recorded as Document # 2009-0122528. Plaintiff asserts that these two written instruments will harm Plaintiff because both instruments purport to transfer Plaintiff's security interest in the subject property and beneficial interest under the deed of Trust to Defendant Stone Corner Trust. Finally, Plaintiff states that the "Revised Full Conveyance" and the "Revised Grant Deed" are fraudulent and that the purported signatory for both the "Revised Full Conveyance" and the "Revised Grant Deed" is not employed by Plaintiff, is not an agent of Plaintiff, and had no authorization to execute any documents on behalf of Plaintiff.

For these reasons, the Court overrules Defendant's demurrer to Plaintiff's first cause of action for cancellation of instruments pursuant to Code of Civil Procedure § 430.10(e).

2. Defendant's Demurrer to Plaintiff's Second Cause of Action for Quiet Title

Defendant Andre Provost, Jr. contends that the Plaintiff's second cause of action for quiet title fails to state facts sufficient to constitute a viable cause of action against Defendant. The essential elements of a cause of action for quiet title are: (1) the complaint must be verified; (2) the legal description and the street address or common designation of the real property; (3) the title of the plaintiff as to which a determination is sought and the basis of the title; (4) the adverse claims to the title of the plaintiff against which a determination is sought; (5) the date as of which the determination is sought; and (6) a prayer for the

determination of the title of the plaintiff against the adverse claims. (Code of Civil Procedure § 761.020.)

Initially, Defendant argues that the Plaintiff has no standing to sue and, thus, cannot invoke the power of the Court because the first amended complaint is unverified, the Plaintiff's lawyers are not proper parties to this action, and the Plaintiff has not provided proof of several matters. However, the Defendant's arguments fail for the same reasons as discussed in the above section regarding Defendant's demurrer to the Plaintiff's first cause of action.

Next, the Court finds that the Plaintiff has alleged sufficient facts to constitute a viable cause of action for quiet title against the Defendant. First, the first amended complaint is verified. Second, the Plaintiff has alleged that the subject real property is legally described as Lot 36, Tract No. 4898 in the City of Fresno, County of Fresno and that the Assessor's Parcel Number is 577-040-21S. Further, the Plaintiff has alleged that the subject real property's street address is 10551 North Medinah Circle, Fresno, California. Third, the Plaintiff has alleged that it has a security interest in the subject property as the beneficiary under a deed of trust recorded in the Fresno County Recorder's Office on July 20, 2004 as Document # 2004-0157223. Fourth, the Plaintiff has alleged that a determination is sought against the adverse claims of Defendant Andre Provost, Jr., Defendant Stone Corner Trust, and anyone else who claims any legal or equitable interest in the subject property arising after the Deed of Trust was recorded on July 20, 2004 which is purportedly superior to the Plaintiff's interest in the subject property. Fifth, the Plaintiff alleges that it seeks to quiet title as against all defendants as of July 20, 2004. Sixth, the Plaintiff alleges a prayer for the determination of its title against the claims of the defendants.

For these reasons, the Court overrules Defendant's demurrer to Plaintiff's second cause of action for quiet title pursuant to Code of Civil Procedure § 430.10(e).

3. Defendant's Demurrer to Plaintiff's Third Cause of Action for Declaratory Relief

Defendant Andre Provost Jr. contends that the Plaintiff's third cause of action for declaratory relief facts to state facts sufficient to constitute a viable cause of action against Defendant. In order to establish a cause of action for declaratory relief, a plaintiff must allege (1) a proper subject of declaratory relief within the scope of Code of Civil Procedure § 1060, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (5 Witkin, California Procedure (5th ed.) § 853.)

Initially, Defendant argues that the Plaintiff has no standing to sue and, thus, cannot invoke the power of the Court because the first amended complaint

is unverified, the Plaintiff's lawyers are not proper parties to this action, and the Plaintiff has not provided proof of several matters. However, the Defendant's arguments fail for the same reasons as discussed in the above section regarding Defendant's demurrer to the Plaintiff's first cause of action.

Next, the Court finds that the Plaintiff has alleged sufficient facts to constitute a viable cause of action for declaratory relief against the Defendant. First, Plaintiff has alleged proper subjects of declaratory relief – a declaration of its rights "over or upon property" and the validity of the instruments entitled "Revised Full Reconveyance" and "Revised Grant Deed." Second, in the third cause of action, Plaintiff alleges that, while Defendant contends that the "Revised Full Reconveyance" and "Revised Grant Deed" are valid documents and that Plaintiff no longer has any interest in the real property under the Deed of Trust, the Plaintiff contends that the "Revised Full Reconveyance" and "Revised Grant Deed" are fraudulent and that the Plaintiff still has an enforceable security interest in the real property pursuant to the Deed of Trust. With these allegations, the Plaintiff has alleged an actual controversy involving justiciable questions relating to the rights or obligations of a party.

For these reasons, the Court overrules Defendant's demurrer to Plaintiff's third cause of action for declaratory relief pursuant to Code of Civil Procedure § 430.10(e).

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **3/27/12** (Date)**.**

(5)

Tentative Ruling

Re: ***Sterling Pacific Lending, Inc. v. Mitchell***
Superior Court Case No. 11 CECG 00826

Hearing Date: March 28, 2012 **(Dept. 402)**

Application: Right to Attach Order and Writ of Attachment

Tentative Ruling:

To grant the application. Proposed orders that are in compliance with Judicial Council Form AT-120 are to be submitted to the Court within 5 days of notice of the ruling.

Explanation:

Notice was given via an Order Shortening Time. See Minute Order filed February 23, 2012. The claim falls within CCP § 438.010. It is against an individual who guaranteed the debt of a business. The amount of the debt is **$2,998,909.49.**

Although the moving party did not address the factors that must be considered when attaching the property of a guarantor, the Declaration of Mitchell (the Guarantor), submitted in opposition indicates that he is the Managing Partner of Double R-D Investments, LLC. Therefore, the requirements for proceeding against a guarantor have been met. Mitchell is actively involved in the operations of the debtor. See *Advance Transformer Co. v. Super.Ct. (Shapiro)* (1974) 44 CA3d 127, 144.

Mitchell argues that the loan at issue is already secured by a Deed of Trust on 11.5 acres in Parlier that is zoned for commercial use. Mitchell also states that as for the properties that are subject to the TRO that he intends to sell them to reduce the amount of debt owed by Double R-D Investments. See Declaration of Mitchell. The Reply indicates that Mitchell waived his rights under Civil Code § 2845 when he signed the Guaranty. Therefore, Plaintiff can proceed against Mitchell regardless of the availability of other remedies against the debtor. See *Bank of America, N.A. v. Stonehaven Manor, LLC* (2010) 186 CA4th 719, 721—attachment upheld where guarantor of debt secured by real property *contractually waived* benefit of security. See also *United Central Bank v. Sup.Ct. (Chang)* (2009) 179 CA4th 212, 215—attachment proper against *guarantors* on loans secured by real property whose obligation is *independent* from that of principal debt.

As for Mitchell's argument that Plaintiff's desire to proceed against him indicates that it is acting in "bad faith" and misusing the power of the RTAO, this ignores that he agreed to guarantee the debt. In doing so, he waived his rights under Civil Code § 2845. Again, the law gives the Plaintiff the power to proceed against him and not the debtor. See *Advance Transformer Co, supra*. As the Plaintiff indicates in the reply, there is a difference between seeking a RTAO against the debtor where the debt is secured by real property and seeking a RTAO against the guarantor. This is correct. In the case at bench, Mitchell is named as the Defendant not Double R-D Investments, LLC. The requirements for the issuance of an RTAO and Writ of Attachment must be determined as to Mitchell not Mitchell and Double R-D. The requirements have been met. Therefore, the application will be granted.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 3/27/2012 .

(Judge's initials) (Date)

Tentative Ruling

Re: ***Davis v. Davis***
Superior Court Case No. 11CECG03047

Hearing Date: March 28, 2012 (**Dept. 502**)

Motion: By defendants to compel arbitration and stay court proceedings

Tentative Ruling:

To grant petition and to appoint Robert K. Hillison as arbitrator

Explanation:

Plaintiff doesn't claim to be opposed to arbitration; only to any delay in the resolution of the current disputes. And defendants don't appear to object to having an arbitrator appointed within 20 days. Though the reply suggests that the appointment should be made 20 days from when certain documents have been provided, that condition is not included in the moving papers and any issue concerning discovery can be addressed by the arbitrator.

Though the opposition suggests that plaintiff is also asking for leave to file an amended complaint that includes two new causes of action, she has filed no such motion so that issue isn't currently before the court.

And while the reply suggests that defendants want a receiver appointed during the pendency of the arbitration, they have not actually submitted such application.

Since both sides agree their dispute is subject to the arbitration clause of the partnership agreement, the petition to compel arbitration will be granted. And since both sides have submitted a list of proposed arbitrators that includes Robert K. Hillison, the court will appoint Mr. Hillison as the arbitrator, subject to his acceptance of the appointment and the disclosures required by CCP §1281.9.

The court will also issue the requested stay, except that if in fact defendants want to seek appointment of a receiver, such request will need to be filed with the court since an arbitrator has no authority to appoint a receiver under CCP §564. See ***Marsch v. Williams*** (1994) 23 Cal.App.4th 238, 246.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary.

The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: DSB (Judge's initials) on 3-27-12 (Date).

03

Tentative Ruling

Re: ***Simmons v. Chokatos***
Case No. 11 CE CG 01724

Hearing Date: March 28th, 2012 (Dept. 403)

Motion: Defendant's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain the demurrer of defendant Fortune as to the first cause of action for negligence, with leave to amend, for failure to state facts sufficient to constitute a cause of action. (CCP § 430.10(e).) To sustain the demurrer as to the second cause of action with regard to defendants Chokatos, Igbinosa, Duenas, and Lonigro for failure to state facts sufficient to constitute a cause of action, with leave to amend. (*Ibid*.)

Plaintiff shall serve and file his second amended complaint within 20 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

First Cause of Action: The first cause of action contains no facts that would tend to show that defendant Fortune breached any duty toward plaintiff, or that his alleged conduct caused plaintiff any harm. Plaintiff alleges that Fortune, a physician's assistant at the prison, discussed plaintiff's further treatment with him after plaintiff was found to have stockpiled 12 morphine pills and 40 Neurontin pills. (FAC, First Cause of action, p. 4, ¶¶ 3, 4.) Fortune warned plaintiff that his medication would be stopped if he was found to have sequestered any more medication. (*Id*. at ¶ 4.) Also, during medical appointments on September 28th and October 26th, Chokatos and Fortune conferred in "whispered voices where Plaintiff could not hear, periodically looking over at Plaintiff." (*Id*. at p. 5, ¶ 8.) Plaintiff does not allege any other facts with regard to Fortune in the first cause of action.

However, these facts fail to show that Fortune breached any duty toward plaintiff, or caused him any harm. In order to state a claim for negligence, the plaintiff must allege facts showing (1) the existence of a legal duty (2) breach of that duty by defendant, (3) proximate causation, and (4) resulting damages to plaintiff. (*Friedman v. Merk & Co*. (2003) 107 Cal.App.4th 454, 463.)

Here, plaintiff has not alleged what duty Fortune allegedly breached, any legal basis for that duty, or any resulting harm to plaintiff. The fact that Fortune told plaintiff not to hoard medication or it would be taken away from him does not

appear to breach any legal duty, nor does it appear to be related to the decision to take away plaintiff's pain medication by Dr. Chokatos at a later date. Also, the fact that Fortune and Chokatos allegedly discussed plaintiff's care in "whispered voices" does not demonstrate any breach of duty or resulting harm to plaintiff. Therefore, plaintiff has not stated a claim for negligence as to Fortune.

Plaintiff argues in opposition that Fortune was aware of the fact that Chokatos had denied his pain medications, and that he had a legal duty to notify his superiors that plaintiff was being forced to suffer severe pain. (Opposition, p. 9:1-6.) This constituted a violation of plaintiff's right to be free of cruel and unusual punishment. (*Ibid*.) Yet plaintiff has not alleged these facts in his first amended complaint, nor has he alleged any statutory or other basis for the imposition of a duty on a physician's assistant to inform his superiors when the doctor makes a decision to deny pain medication to a patient. Therefore, plaintiff has failed to allege facts sufficient to constitute a cause of action for general negligence against Fortune. Thus, the court intends to sustain the demurrer to the first cause of action as to Fortune, with leave to amend.

Second Cause of Action: Defendants argue that plaintiff has not alleged any facts to support his second cause of action for intentional tort, which is apparently based on alleged violations of Civil Code §§ 51.7 and 52.1.

"The Ralph Act, codified in Civil Code section 51.7, provides: 'All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of [Civil Code s]ection 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.'" (*Austin B. v. Escondido Union School Dist*. (2007) 149 Cal.App.4th 860, 880.)

"CACI No. 3023 sets forth the elements of a Ralph Act claim: '1. That [the defendant] threatened or committed violent acts against [the plaintiff or his or her property]; [¶] 2. That a motivating reason for [the defendant's] conduct was [[his/her] perception of [the plaintiff's age or disability]]; [¶] 3. That [the plaintiff] was harmed; and [¶] 4. That [the defendant's] conduct was a substantial factor in causing [the plaintiff] harm." (Italics added.)" (*Id*. at 880-881.)

"The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277.)

Here, defendants Chokatos, Igbinosa, Duenas, and Lonigo contend that plaintiff has not alleged that they committed any acts of violence against him, or threatened him with violence, and therefore plaintiff has not stated a claim for

violation of the Ralph Act. It is true that plaintiff has not alleged any acts of violence or threats of violence against him.

"Black's Law Dictionary defines violence as 'Unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury. . . .' (6th ed. 1990, p. 1570, col. 1.) Webster's Third New International Dictionary defines violence in part as 'exertion of any physical force so as to injure or abuse . . . intense, turbulent, or furious action, force, or feeling often destructive . . ..' ((1970) p. 2554, col. 2.)" (*People v. Babich* (1993) 14 Cal.App.4th 801, 807, fn. 2.)

In the present case, plaintiff alleges only that Dr. Chokatos denied him pain medication, tried to have his wheelchair taken away because he no longer needed it, and had his custody classification changed so that he no longer had access to a wheelchair accessible cell. (FAC, pp. 4-5, ¶¶ 6-10, pp. 7-8, ¶¶ 27-28.) Chokatos also "wantonly and willfully forced Plaintiff to sign a 'contract' under duress, or take Plaintiff's wheelchair; committed battery on an inmate after disclosing that he was a racist; and fraudulently recorded findings in Plaintiff's Unit Health Record (UHR) contrary to documented objective diagnostic studies demonstrating significant medical condition(s) for the purpose of advancing his racist ideation to inflict suffering and hardships on Plaintiff…" (*Id*. at pp. 7-8, ¶ 28.)

However, while plaintiff apparently contends that Chokatos intimidated him into signing the contract, and committed battery against him by performing medical procedures to which he did not consent, these allegations do not appear to be the type of "violence" or threats of violence contemplated by the Ralph Act. There are no allegations of "unjust or unwarranted exercise of force" against plaintiff by Chokatos or anyone else. At most, Chokatos denied plaintiff pain medication that plaintiff believed he needed, and made a medical decision to take away his wheelchair if plaintiff did not participate in physical therapy. This does not appear to be the type of violence, threats or intimidation prohibited under the Ralph Act. Therefore, plaintiff has not stated facts sufficient to constitute a cause of action under the Ralph Act as to Chokatos.

Plaintiff alleges even fewer facts against defendants Igbinosa, Duenas, and Lonigro. Plaintiff seeks to hold them liable under the Ralph Act because they sat on the Medical Review Committee that upheld Chokatos' decisions. (FAC, p. 8, ¶ 29.) However, since plaintiff has not alleged that Chokatos' engaged in any violence or threats of violence under the Ralph Act, the fact that the other defendants upheld Chokatos' medical decisions does not support a claim under the Ralph Act as to them. Even if plaintiff had alleged such facts against Chokatos, plaintiff does not allege that the other defendants participated in the threats or violence, or aided, conspired with, or abetted Chokatos' conduct. Thus, plaintiff has not stated a claim under the Ralph Act against defendants.

Nor has plaintiff stated a claim against Chokatos, Igbinosa, Duenas, or Lonigro under the Bane Act.

"Civil Code section 52.1 provides in part: '(a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured… [¶] (b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages …' (Italics added.)" (*Austin B. v. Escondido Union School Dist*., *supra*, 149 Cal.App.4th at 881-882.)

"The elements of a cause of action under Civil Code section 52.1 are stated in CACI No. 3025: '1. That [the defendant] interfered with [or attempted to interfere with] [the plaintiff's] [constitutional or statutory right] by threatening or committing violent acts; [¶] 2. [That [the plaintiff] reasonably believed that if [he/she] exercised [his/her] [constitutional] right [the defendant] would commit violence against [him/her] or [his/her] property;] [¶] [That [the defendant] injured [the plaintiff] or [his/her] property to prevent [him/her] from exercising [his/her] [constitutional] right or retaliate against [the plaintiff] for having exercised [his/her] [constitutional] right;] [¶] 3. That [the plaintiff] was harmed; and [¶] 4. That [the defendant's] conduct was a substantial factor in causing [the plaintiff's] harm.'" (*Id*. at 882.)

" 'The Legislature enacted [Civil Code] section 52.1 to stem a tide of hate crimes.' [Citation.] Civil Code section 52.1 requires 'an attempted or completed act of interference with a legal right, accompanied by a form of coercion.' [Citation.] To obtain relief under Civil Code section 52.1, a plaintiff need not allege the defendant acted with discriminatory animus or intent; a defendant is liable if he or she interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion. [Citation.]" (*Ibid*.)

"The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law. [Citation.]" (*Id*. at 883.)

However, "nothing in Civil Code section 52.1 requires any showing of actual intent to discriminate." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841.)

Also, the plaintiff does not have to be a member of a protected class in order to bring a claim under the Bane Act. (*Id*. at 842.) In fact, the plaintiff does not even have to allege that he or she was the victim of intimidation or interference based on an actual or perceived class or characteristic protected by Civil Code § 51.7. (*Ibid*.) Nor does the plaintiff have to allege that he or she was the victim of a hate crime to state a claim under the Bane Act. (*Id*. at 843.)

Here, plaintiff has only alleged that Dr. Chokatos denied plaintiff his pain medication, thus causing him severe pain, and also tried to take away his wheelchair and forced him to sign a contract regarding physical therapy or he would take away his wheelchair. (FAC, pp. 7-8, ¶¶ 27-28.) The other defendants upheld Chokatos' decisions on appeal. (*Id*. at p. 8, ¶ 29.)

Yet plaintiff has not alleged that Chokatos or any of the other defendants engaged in any acts of violence against plaintiff, or threatened him with violence in order to interfere with his rights. At most, plaintiff alleges that Chokatos took away his pain medication and threatened to take away his wheelchair if he did not agree to physical therapy. These types of medical decisions do not appear to be the kind of "threats, intimidation, or coercion" that the Bane Act was intended to punish or prevent. The Bane Act prohibits interference with plaintiff's constitutional or statutory rights by "threatening or committing violent acts" (*Austin B., supra*, at 882.), not medical decisions as to whether plaintiff will receive medications or assistive devices such as wheelchairs. Therefore, the court intends to sustain the demurrer to the second cause of action as to all defendants, with leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: MWS (Judge's Initials) **on 3/13/12** (Date).

(19) **Tentative Ruling**

Re: ***Woodmansee v. DCL Investments***
Superior Court Case No. 10CECG03284

Hearing Date: March 28, 2012 (Dept. 403)

Motion: by plaintiff for leave to file 2nd Amended Complaint

Tentative Ruling:

To grant and order that the Second Amended Complaint be filed and served by April 6, 2012.

Explanation:

No trial date has ever been set in this case, and there is no discovery cut-off. Defendants oppose the amendment on the basis that they wish to see an offer of proof of the truth of the new allegations. However, a motion to amend is not the proper venue for such a request. Leave to amend is to be liberally granted, and defendants have not articulated any actual prejudice. See *Kerkeles v. City of San Jose* (2011) 199 Cal. App. 4th 1001, 1017 citing *Burkle v. Burkle* (2006) 141 Cal. App. 4th 1029, 1042, discussing the "strong policy in favor of liberal allowance of amendments."

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS (Judge's initials) on 3/27/12 (Date).

Tentative Ruling

(24)

Re: ***Keily Miller, et al. v. Rick A. Patterson, et al.***
Court Case No. 11CECG03604

Hearing Date: **March 28, 2012 (Dept. 403)**

Motion: 1) Defendants' Demurrer to the First Amended Complaint
2) Defendants' Motion to Strike

Tentative Ruling:

To sustain demurrer to the First cause of action (Declaratory Relief) as to defendant Francis Patterson, only, without leave to amend. To overrule the demurrers to Second (Breach of Contract) and Third (Accounting) causes of action.

To deny the motion to strike.

Explanation:

Demurrer:

Declaratory Relief cause of action:

Plaintiffs acknowledge that Mrs. Patterson has no direct liability in this action, but has only been named in the Declaratory Relief cause of action since her community property interest in the real property is or may be impacted by this action. The case cited by defendants in reply, *11601 Wilshire Assocs. v. Grebow* (1996) 64 Cal.App.4th 453 ("*11601 Wilshire Assocs.*") is directly on point. It indicates that the appropriate "controversy" for a declaratory judgment, pursuant to Family Code §910, is an allegation that the non-debtor spouse disputes that his/her share of the community would be liable for a judgment against the debtor spouse. [*Id.* at 458] In that case, the court found that this allegation could not possibly be made, in light of the facts that were put forth in the summary judgment motion showing that the non-debtor spouse made no such contention. Here, no such allegation is made in the FAC, or alluded to in plaintiffs' opposition. They clearly name Mrs. Patterson only because of the community property interest in the real property held by her husband, obviously in an effort bind her as to the effect of any judgment obtained in this action. Their concern is understandable.

The holding of *11601 Wilshire Assocs.* supports sustaining a demurrer where the non-debtor spouse is only named as "community representative" and he/she does not want to be involved in the debtor-spouse's litigation. In *11601 Wilshire Assocs.,* a landlord sued his tenants for breach of lease, and named the

wife of one of the tenants as defendant, even though she had not signed the lease, nor had she guaranteed the obligation in any way. The wife obtained a summary judgment dismissing her from the action because no cause of action was stated against her pursuant to Family Code §910. [*Id.* at 455]

More importantly in this context, the court in *11601 Wilshire Assocs.* also denied plaintiff's alternate request to *amend the complaint to add a declaratory relief cause of action against the wife*, relying on the holding of *Reynolds & Reynolds Co. v. Universal Forms, Labels & Sys.* (1997) 965 F.Supp. 1392, 1397 (a Federal case interpreting California law). In both cases the courts ruled that where the non-debtor spouse is included in an action solely in the capacity as a community representative, "and such spouse does not desire to participate in the litigation, there appears to be no legitimate advantage to plaintiff in forcing the unwilling spouse to participate in the litigation." [*11601 Wilshire Assocs. v. Grebow, supra,* 64 Cal.App.4th at 457, quoting the holding in *Reynolds* at p.1397]

The court in *Reynolds* stated further that in such a case "the non-debtor spouse may opt not to participate in the litigation, and will be dismissed as essentially a nominal defendant upon the non-debtor spouses' request." [*Reynolds & Reynolds Co. v. Universal Forms, Labels & Sys., supra* 965 F.Supp. at 1397] Of course, the court noted, "the dismissed spouse cannot later contest the determinations of liability and community responsibility made in that spouses' absence. See Civil Code § 3521: 'He who takes the benefit must bear the burden'" [*Id.* at 1397]

The court makes the ruling herein in light of this language. It is reasonable to consider this demurrer as Mrs. Patterson's request to be allowed to not participate in this action, and the court understands this request to include her intent to be bound as to her community property interest by whatever judgment is rendered in this action. Therefore, the demurrer is sustained without leave to amend, since plaintiffs have clearly indicated in their opposing brief that they do not seek to allege any personal obligation on her part, but merely seek to include her because her community property interest in this property may be affected.

Breach of Contract cause of action:

Plaintiffs have not stated this cause of action against Mrs. Patterson, so the discussion concerning her as to this cause of action is moot. In analyzing the demurrer as to Mr. Patterson, the court first considers defendants' request to take judicial notice of the Deed of Trust attached as Exhibit C to their Request.

First, the court will assume that this is a certified document, as it is purported to be on the last page of that document. The court can take judicial notice of this document; however, it does not unequivocally establish the starting

or ending of a statute of limitations period having to do with the contract at issue in this complaint. In fact, there is nothing in the Deed of Trust which even ostensibly connects this document with the TIC Agreement. The Deed of Trust does not reference the TIC Agreement (in fact, it references a Note, which does not appear to have been alleged in the complaint or alluded to by defendant on this motion). The fact that it was dated *around* the time of the TIC Agreement (that Agreement was dated April 1, 1992, and the Deed of Trust is dated July 30, 1992), and that it is secured by the same real property (judging from the property description attached to each document) does not establish that the Deed of Trust is dispositive of any rights and duties under the TIC Agreement, without more. A demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible. [*Crosstalk Productions, Ltd. v. Jacobson* (1998) 65 Cal.App.4th 631, 635] Thus, even if the court takes judicial notice of this document, it does not aid in establishing that the demurrer should be sustained.

Neither does the TIC Agreement itself provide an obvious statute of limitations period at ¶3, as defendants argue in Reply. This is the paragraph indicating that the Agreement has a term of 15 years. Defendants argue that this provision would mean that the Agreement would have terminated by its own terms as of March 31, 2007, making the very latest date plaintiff could bring this action March 31, 2011 (4 years). This argument fails to convince, however, because ¶3 also states that the period is 15 years "unless sooner terminated or extended by the mutual agreement of the owners." If termination of the contract provisions at year 15 is not an absolue, then the 15th year does not provide a clear beginning of a limitations period. Also, Mr. Patterson's participation in the offer process as alleged in the complaint (he responded to plaintiff's purchase offer by *expressly relying* on ¶11 of the Agreement), in and of itself provides indication that *defendant* did not regard the agreement as terminated, despite the passage of 15 years. Therefore, for purposes of demurrer, this paragraph does not provide a definite and clear start to any limitation period.

Therefore, even if the TIC Agreement might contain sufficient language on its face to create an inference that a statute of limitations may have run as to the $8,000 payment, there can be no similar inference drawn as to the $124,000 payment. For a complaint to be subject to general demurrer based on being barred by a statute of limitation, the running of the statute must appear "clearly and affirmatively" from the dates alleged. It is not enough that the complaint *might* be barred. [*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324–325]

As for the alleged breach of Mr. Patterson for failing to manage the property as agreed under Section 4, plaintiffs have adequately stated a claim that he failed to manage the property, since they refer to the portion of the TIC Agreement where Patterson was obligated to manage it, and they allege at ¶19

and ¶29(c) that he did not perform this duty. The mere fact that the agreement refers to the expectation that a property management firm would be hired does not sufficiently imply that defendant did not breach the contract, and defendants' arguments about this are conclusory. The motion's discussion regarding the allegations as to Mr. Patterson's management duties cannot be taken as an argument that the complaint is uncertain (ambiguous and/or unintelligible), since defendants have filed a *general* demurrer, and a claim of uncertainty can only be reached by *special* demurrer. [CCP §430.10(f)]

In conclusion, even if (as noted above) the $8,000 payment might be time-barred, this is insufficient to subject the breach cause of action to demurrer. If on consideration of all the facts stated it appears that the plaintiff is entitled to *any* relief, the complaint will be held good [*Salimi v. State Comp. Ins. Fund* (1997) 54 Cal.App.4th 216, 219] A complaint withstands a general demurrer, if, on consideration of all the facts stated, it appears that the plaintiff is entitled to some relief, even if the facts are inartfully stated or intermingled with irrelevant facts or the complaint demands relief to which plaintiff is not entitled under the facts alleged [*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 123]

Accounting cause of action:

As with the demurrer to the breach cause of action, plaintiffs have not stated the accounting cause of action against Mrs. Patterson, so the discussion concerning her as to this cause of action is moot.

To obtain an accounting, plaintiff must allege some relationship between the parties or other circumstances that would permit the court in equity to maintain jurisdiction in an action for an accounting, *and* a balance due from the defendant that can only be ascertained from the accounting. [*St. James Church of Christ Holiness v. Superior Court of Los Angeles County* (1955) 135 Cal.App.2d 352, 359]

Defendants acknowledge that plaintiffs allege at ¶32 that they "believe defendants have received funds incidental to management of the Property which have not been accounted for to Plaintiffs." However, defendants conclude that any such balance due could "easily be calculated without an accounting." In the main argument they fail to explain *how*. In the reply brief they appear to argue that the "how" would be via evidence uncovered during discovery.

Obviously, it might be argued as to any cause of action for accounting that plaintiff might be able to calculate what he is owed after conducting discovery. But that misses the point, as is clear from the very case defendant relies on. As stated in the case of *St. James Church of Christ Holiness v. Superior Court of Los Angeles County* (1955) 135 Cal.App.2d 352, 359 ("*St. James Church*"), an action for accounting will not lie "where it appears **from the complaint** that none

is necessary or that there is an adequate remedy at law. [*Id.*, citing to *Faivre v. Daley* (1892) 93 Cal. 664, 673, emphasis added]

Defendants seek to make the pleading burden more onerous than it actually is; a plaintiff need not consider what may be disclosed in discovery in making this allegation. As the Witkin treatise notes: "To state a cause of action [for accounting], only the simplest pleading is required." [5 Witkin Cal. Proc. Plead § 820] The court in *St. James Church* clearly set forth that accounting will not lie "with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain." [*St. James Church, supra* at 359] This might call into question the sufficiency of the accounting claim as to the $8,000 and the $124,000 payments owed, since these are "sums certain." However, plaintiffs have stated a good cause of action for accounting with reference to the "funds incidental to management of the Property." They allege both that monies are owed, and that the amount owed cannot be determined without an account (see FAC ¶32). This is sufficient to withstand demurrer.

Motion to Strike

The motion to strike is largely moot given the ruling on the demurrer. The court need only deal with the arguments concerning striking the language in the Declaratory Relief action concerning a private auction (asking that the court consider a declaratory judgment requiring one). Defendants overlook the fact that CCP §1060 not only contemplates a declaratory judgment as to rights *under a contract*, but it also allows a plaintiff who desires a "declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property." Clearly, the complaint alleges that the parties jointly own property, and that plaintiffs desire to sell their interest in this property. Thus, the remedy of the private auction is within the ambit of the court's authority under the broad equitable remedy afforded by CCP §1060, and this language not rendered irrelevant or improper merely because it is not a remedy under the contract.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **3/27/12** (Date) .